IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1378

RUSSELL E. TRAIN, Administrator,
United States Environmental Protection Agency,
Petitioner,

v.

CAMPAIGN CLEAN WATER, INC.,
Respondent

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENT, CAMPAIGN CLEAN WATER, INC.

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BRIEF FOR THE RESPONDENT, CAMPAIGN CLEAN WATER, INC.

QUESTIONS PRESENTED

1. Did the lower courts correctly hold that, in passing the Federal Water Pollution Control Act Amendents of 1972, Congress did not intend to give the Administrator unbridled discretion to withhold allotments for sewage treatment plant construction grants?

2. Did the lower courts correctly hold that the Administrator's refusal to allot 55 percent of the sewage treatment plant funds for fiscal years 1973 and 1974 is reviewable by the courts as an abuse of discretion?

STATEMENT

INTRODUCTION

In October 1972, after more than two years of deliberation, Congress passed over the President's veto the Federal Water Pollution Control Act Amendments of 1972 ("the Act"), 33 U.S.C. §§1251 *et seq.* (Supp. II, 1972), an historic enactment which had as its objective the restoration of the nation's waters to their natural state. The heart of this ambitious legislation was the commitment of vast amounts of federal funds to state and local governments to assist in the construction of sewage treatment plants. The President opposed the bill, chiefly because of its spending levels, and he vetoed it despite a conference committee compromise intended to give him limited discretion to withhold funding for budgetary reasons. When the vetoed bill was returned to Congress, the principal spokesmen for the bill in both houses, while acknowledging the magnitude of federal spending, reiterated the vital importance of cleansing this country's lakes and streams, and the veto was overridden by decisive margins.

A few weeks later, the President ordered the Administrator of the Environmental Protection Agency ("the Administrator") to allot among the states only $5 billion of the $11 billion authorized by Congress for the first two fiscal years of the construction grant program's operation, thus seeking to accomplish by the controversial practice of "impoundment" that which he had failed to achieve in exercising his

constitutional veto power. In this suit Campaign Clean Water, Inc. ("Campaign Clean Water") contends – and both the District Court and Court of Appeals held – that Congress intended to limit the Administrator's discretion to withhold such allotments and that, as the District Court found, the Administrator's allotment of only 45 percent of such funds was an abuse of his discretionary authority under the Act.

1. The Legislative History of the Act

From the time the forerunner of the present Act was enacted in 1956, a principal feature of the federal program has been to provide grants to assist state and local governments in the construction of sewage treatment plants. However, the amount of federal funds made available for that purpose was relatively small, amounting to only $2.1 billion from 1957 through 1970.[1] It became increasingly clear that more vigorous federal action would be required if the battle against water pollution was to be won, and accordingly, in 1970 and 1971 the public works committees of both houses of Congress held extensive hearings on a legislative revamping of federal water pollution control programs.[2]

[1] *Hearings on Water Pollution Control Legislation – 1971 (Oversight of Existing Programs), Before the House Comm. on Public Works*, 92d Cong., 1st Sess. 19 (1971), (hereinafter cited as "*House Phase I Hearings*").

[2] See *Hearings on Water Pollution – 1970, Before the Subcomm. on Air and Water Pollution of the Sen. Comm. on Public Works*, 91st Cong., 2d Sess. (1970); *Hearings on Water Pollution Control Legislation, Before the Subcomm. on Air and Water Pollution of the Sen. Comm. on Public Works*, 92d Cong., 1st Sess. (1971)

(continued)

These hearings revealed that vast amounts of money were needed for the construction of waste treatment plants. For example, a survey of over 1,000 municipalities conducted by the National League of Cities and the U.S. Conference of Mayors showed that between $33 and $37 billion would be required to finance sewage treatment construction for the ensuing six years. See 116 Cong. Rec. 23330-37 (1970) (reprinting the survey report). These hearings also demonstrated that federal funds were needed to finance the construction of projects other than treatment plants, such as sewage collection systems, which had previously been ineligible for federal funding;[3] that many cities needed substantial funds to deal with overflow problems caused by combined storm and sanitary sewage systems;[4] that enforceable deadlines for meeting various water

2 (continued) (hereinafter cited as "*1971 Senate Hearings*"); *House Phase I Hearings, supra* note 1; *Hearings on Water Pollution Control Legislation – 1971 (Proposed Amendments to Existing Legislation), Before the House Comm. on Public Works*, 92d Cong., 1st Sess. (1971) (hereinafter cited as "*House Phase II Hearings*"); *Hearings on Water Pollution Control Legislation – 1971 (H.R. 11896, H.R. 11895), Before the House Comm. on Public Works*, 92d Cong., 1st Sess. (1972) (hereinafter cited as "*House Phase III Hearings*"). In 71 days of hearings, the two public works committees heard a total of 465 witnesses, received 605 additional statements, and published hearing records totaling 10,522 pages.

3 See, *e.g.*, *House Phase II Hearings, supra* note 2, at 200-01; H. Rep. No. 92-911, 92d Cong., 2d Sess. 88, 98 (1972), *reprinted in* Environmental Policy Division, Congressional Research Service, Library of Congress, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 775, 785 (1973) (hereinafter cited as "L.H.").

4 See, *e.g.*, *House Phase I Hearings, supra* note 1, at 11, 58-61; *House Phase II Hearings, supra* note 2, at 27, 34-36. Projects to remedy such problems were then ineligible for federal financial assistance.

quality goals were required;[5] and that tougher enforcement provisions were called for, see *Senate Hearings, supra* note 2, at 727, 731.

By overwhelming margins,[6] the House and Senate passed similar bills, and the differences were ironed out in protracted conference committee deliberations. The bill that finally emerged was the most far-reaching piece of water pollution legislation in this country's history. Its overall objective was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[7] or, more simply, to return America's waters to their natural state. A timetable for achieving this objective was imposed by two "national goals" – an interim goal of achieving by 1983, wherever attainable, a level of water quality which would provide for the protection and propagation of aquatic life and other wildlife and for human recreation in and on the water (the "swimmability" standard), and a final goal of completely eliminating discharges

5 See *Senate Hearings, supra* note 2, at 102 (staff document stating that only 24 states had complied with 1965 statutory provision requiring submission to the federal government of water quality standards because of the omission of enforceable timetables in the earlier statute).

6 S. 2770 passed the Senate on November 2, 1971, by a vote of 86-0. H.R. 11896 passed the House on March 29, 1972, by a vote of 380 to 14.

7 See §101(a). The House committee report gave an elaborate definition of the term, "the restoration and maintenance of the chemical, physical, and biological integrity of the Nation's waters." L.H. 763-64. Section 304(a)(2) requires the Administrator to develop and publish information concerning water quality criteria which will define the term further. See L.H. at 1301 (remarks of Senator Eagleton).

of pollutants into navigable waters by 1985. §§101(a)(1), (2).

Still other deadlines in the bill were made specifically applicable to publicly owned waste treatment plants, and failure to meet them was declared to be "unlawful." §301(a). The bill directed that all such plants in existence in mid-1977, or under construction and approved by the Administrator prior to mid-1974, comply with effluent limitations based upon at least a secondary level of treatment,[8] and that by mid-1983 all plants approved after mid-1974 employ "the best practicable technology." §§301(b)(2)(B); 201(g)(2)(A). The Administrator was given a non-discretionary duty to enforce the deadlines, §309, and private citizens were authorized to enforce them through civil suits, §505.

To ensure that municipalities would be able to comply with these deadlines, the conference committee bill authorized the expenditure of $20.75 billion for waste treatment plant construction grants. Eighteen billion dollars was earmarked for federal grants to pay 75 percent of the cost of waste treatment plant projects initiated by states and local governments, with $5 billion being authorized for fiscal year 1973, $6 billion for fiscal year 1974, and $7 billion for fiscal year 1975. §207. The remaining $2.75 billion was

[8] See §301(b)(1)(B). In primary treatment, solid matter is settled out of sewage in sedimentation tanks, reducing the detrimental impact on the receiving stream by 25-30 percent. In secondary treatment, micro-organisms in an aeration tank accelerate the decomposition process, reducing the detrimental impact by as much as 90 percent. At about the time the bill was pending before Congress, 38 percent of the nation's sewage was discharged with no treatment, and an additional 30 percent received only primary treatment. See L.H. 495 (remarks of Rep. Vanik).

intended to reimburse municipalities that had voluntarily initiated construction projects without federal assistance in prior years. §206. Not only did the bill respond to the needs identified during the hearings by making more funds available, but it also provided that they could be used to finance sewage collection systems and projects to separate existing combined storm and sanitary sewage systems. §212(a), (b).

In an attempt to remedy the uncertainty that had plagued states and cities under previous law, the bill provided for a "contract authority" method of funding whereby they would know well in advance exactly how much federal money would be available for a given fiscal year. Under this mechanism the funding process consisted of five separate and successive stages: authorization, allotment, obligation, appropriation, and payment. The distinction between these stages is important, particularly since it was blurred at times during the floor debates. First, under section 207 specific sums were *authorized* to be appropriated for three fiscal years. Second, under section 205 these sums were to be *allotted* by the Administrator among the states in accordance with a statutory formula based on each state's waste treatment needs. Third, applicants were to submit to the Administrator plans for specific construction projects, and the Administrator was to approve or disapprove each proposal, with his approval constituting a binding *obligation* of the federal government to pay its share of construction costs. Fourth, *appropriations* were to be made by Congress to cover payments of the federal share of construction costs from time to time as they became due. Finally, the Administrator was to make periodic *payments* to each grantee.

In short, the bill reported by the conference committee was carefully tailored to meet the many needs that had been identified during the months of hearings before the two public works committees. The culmination of two years of deliberation was a bill that offered greatly increased construction grant funding, permitted long-range planning by states and cities, expanded significantly the kinds of projects eligible for federal funding, established enforceable deadlines for meeting certain water quality standards, and backed up those deadlines with new, more stringent enforcement provisions.

The inclusion of such provisions in the bill had not been won easily. Many of them had been fought by the President and his spokesmen at every step of the proceedings before the House and Senate committees. First, the President was strongly opposed to the $18 billion of expenditures called for by S. 2770 and submitted his own bill in 1971 providing for only $6 billion of construction grant funds for a period of three fiscal years.[9] The Administration also:

– opposed providing for "contract authority" funding,[10] see *House Phase III Hearings, supra* note 2, at 292, 297;

[9] See S. 1013, 92d Cong., 1st Sess. (1971). To justify this drastically lower level of funding, EPA produced its own study of construction needs to counter that of the National League of Cities and U.S. Conference of Mayors. EPA's study showed construction needs of $12.56 billion over a period of three fiscal years, but it did not include estimates of the costs of constructing sewage collection systems or of separating combined storm and sanitary systems, both of which were then ineligible for federal funding but which were made eligible under the Act. See L.H. 121-22, 365-66, 1452.

[10] Amendments to delete the contract authority provisions were offered and rejected in both the Senate and House. See L.H. 348-49, 608-09, 616-42, 1367 *et seq.*

– opposed increasing the federal share of construction projects from 55 to 75 percent, see *House Phase II Hearings, supra* note 2, at 6; *House Phase III Hearings, supra* note 2, at 296-97;

– opposed establishing deadlines for attaining the national goals of achieving "swimmable" waters by 1983 and of eliminating all discharges of pollutants by 1985, see *House Phase III Hearings, supra* note 2, at 294;

– opposed making projects for constructing sewage collection systems eligible for federal grants, see *id.* at 298;

– opposed imposing a deadline for achievement of secondary treatment by municipal waste treatment plants, see *id.* at 299; and

– opposed making the Administrator's enforcement duties mandatory rather than discretionary, see *id.* at 338.

Because the President objected to so many of the bill's provisions, the conferees recognized that a veto was likely. In a last ditch effort to achieve a political compromise that would avoid a veto, the conferees agreed in their final meeting to two changes designed to grant the executive branch a limited measure of discretion in controlling the commitment of federal funds for waste treatment plant construction. These amendments were as follows, with deletions being bracketed and additions italicized:

ALLOTMENT

Section 205. (a) [All] Sums authorized to be appropriated pursuant to section 207 * * * shall be allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized * * *

* * *

AUTHORIZATION

Sec. 207. There is hereby authorized to be appropriated to carry out this title * * * for the fiscal year ending June 30, 1973, *not to exceed* $5,000,000,000, for the fiscal year ending June 30, 1974, *not to exceed* $6,000,000,000, and for the fiscal year ending June 30, 1975, *not to exceed* $7,000,000,000.

Because the conference committee report does not explain the meaning of these changes, one must look to the floor debates for a clue as to the conferees' intent. In commenting on the amendments during the Senate debate, Senator Muskie, the bill's sponsor, stated:

> "[A]ll sums authorized to be obligated need not be committed, though they must be allocated. These * * * provisions were suggested to give the administration some flexibility concerning the obligation of construction grant funds. [L.H. 166].

This statement indicates that the conferees intended the Administrator to exercise his "flexibility" at the obligation stage, under section 203, rather than at the allotment

stage, under section 205; it does not explain, however, why in that case the conferees did not amend section 203 rather than section 205. Senator Muskie then added the following statement, which suggests that the conferees intended the Administrator to be able to exercise his "flexibility" only in the most exceptional circumstances:

> [T]here may be instances in which the obligation of funds to a particular project in a particular State may be contrary to other public policies such as the National Environmental Policy Act. In these cases the conferees would, of course, expect the Administration to refuse to enter into contracts for construction. [*Id.*].

A considerably different view of the conferees' intent was offered in the House debates by Representative Harsha, the ranking Republican on the House Public Works Committee. Where Senator Muskie had suggested that the Administrator could exercise his discretion to withhold funds only in rare circumstances when other federal laws were violated, Representative Harsha implied that money could be impounded on the basis "competing national priorities," a vague reference that could encompass consideration of inflationary pressures. *Id.* at 244. Representative Harsha also stated, again in contrast to Senator Muskie's narrower view, that "the language means we can obligate or expend * * * *anything* up to that sum, but not to exceed that amount," *id.* at 247. a statement that the Administrator has relied on in this litigation to argue that his impoundment discretion is virtually without limits. See Br. 18. On October 4, 1972, the Senate passed the bill by a vote of 74-0, and the House approved it by a margin of 366 to 11.

On October 11, 1972, William D. Ruckelshaus, who was then Administrator of the Environmental Protection Agency, wrote to the Office of Management and Budget strongly recommending that the President sign the bill. *Id.* at 143 *et seq.* The letter pointed out that the short-term inflationary impact of the bill would be negligible since no significant payments would be made until after mid-decade. The Administrator also observed that he had been given some flexibility in committing construction grant funds and could consider inflationary effects in committing funds under the Act. Administrator Ruckelshaus concluded his letter by stating:

> More so than any other, water is our most important natural resource. It sustains our industry, our farms, our commerce, our enjoyment, our lives. It is also most unforgiving if it is abused. The effects linger and, if continued, multiply.
>
> It seems reasonable to me to spend less than 1% of the Federal budget and two-tenths of 1% of the Gross National Product over the next several years to assure for future generations the very survival of the Gross National Product. [*Id.* at 157-58].

Despite the recommendation of the Administrator and the overwhelming sentiment of both houses of Congress, the President vetoed S. 2770 on October 17. His veto message to Congress stated that his action was necessary because "*the highest national priority [is] the need to protect the working men and women of America against tax increases and renewed inflation.*" *Id.* at 138 (emphasis in original). The President added:

> Even if this bill is rammed into law over the better judgment of the Executive – even if the Congress defaults its obligation to the taxpayers – I shall not default mine. Certain provisions of S. 2770 confer a measure of spending discretion and flexibility upon the President, and if forced to administer this legislation I mean to use those provisions to put the brakes on budget-wrecking expenditures as much as possible. [*Id.* at 139].

The Congress lost no time in overriding the veto. On the day the veto was announced, 81 percent of the Senators present voted to override the President's veto. The next day, the bill was again submitted to the House. There Representative Harsha re-emphasized the importance of committing the larger sums of money called for by the bill in order to achieve the objective of completely cleansing the nation's waters by 1985. He stated:

> I don't think there is one Member of this body who has not asked his constituents whether or not they were willing to pay the high price to achieve our national environmental goals. I don't think that there is one Member of this body who could report that after such polling, his constituents objected * * * *
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> * * *
>
> * * * * [T]he President maintained that a vote to override the veto * * * was a vote to increase the likelihood of higher taxes. So be it, the public is

> prepared to pay for it. To say we can't afford this sum of money is to say we can't afford to support life on earth. [*Id.* at 99].

The House voted by an overwhelming 91 percent margin to join the Senate in overriding the President's veto. After two years of deliberation, the most important water pollution bill ever to be passed by Congress had become law.

2. The Impoundment

Just five weeks later, on November 22, 1972, in an attempt to defeat the veto-override by refusing to permit the allotment of the funds that Congress had authorized, the President wrote Administrator Ruckelshaus as follows:

> I direct that you not allot among the States the maximum amounts provided by section 207 of the Federal Water Pollution Control Act Amendments of 1972. No more than $2 billion of the amount authorized for the fiscal year 1973 and no more than $3 billion of the amount authorized for the fiscal year 1974 should be allotted. [App. 15-16].

Six days later, Mr. Ruckelshaus announced that, at the President's direction, he was allotting only $5 billion of the total $11 billion authorized for these two fiscal years or, more correctly, that he was withholding 55 percent of the total funding.

Under the allotment formula prescribed by section 205(a) of the Act, the Commonwealth of Virginia is entitled to receive 2.9143 percent of the total allotments

for fiscal years 1973 and 1974. 37 Fed. Reg. 26282 (December 8, 1972). If the full sums authorized under section 207 had been allotted, Virginia would have received $145.7 million for obligation in fiscal year 1973 and almost $175 million in fiscal year 1974, for a total of more than $320 million. Under the drastically reduced allotment, Virginia received contract authority amounting to only about $58 million in fiscal year 1973 and about $87 million in fiscal year 1974, for a total of only $145.7 million, the exact amount it would have received in fiscal year 1973 alone under the congressional scheme. In other words, Virginia was denied the use of approximately $175 million of 1973 and 1974 funds because of the Administrator's action. [11]

The severe impact of the impoundment on the Commonwealth is dramatized by a civil action filed against the Administrator of EPA by the Virginia State Water Control Board on July 19, 1974. *State Water Control Board v. Train*, No. CA-74-0238-R (E.D. Va.). The Board alleged that because of the impoundment it has had to delay the planning and construction of plants needed to meet the Act's 1977 deadline for achieving secondary treatment. The Board further alleged that, due to the approximately 2 1/2 to 3 1/2 year lead time required to plan and build a sewage treatment plant, the Commonwealth's municipalities could not now meet that deadline,

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[11] Not involved in this case is the impoundment of $3 billion of the total $7 billion of fiscal year 1975 funds which was announced by the Administrator on January 10, 1974. Virginia was allotted about $98 million for 1975, but it "lost" an additional $74 million as a consequence of that impoundment, bringing its three-year total of withheld allotments to almost $250 million.

even if the funds were released immediately. The complaint seeks both declaratory and injunctive relief to excuse Virginia from meeting the 1977 deadline and to release the impounded funding.[12]

A recent report to the Congress by the Administrator further underscores Virginia's plight. In EPA's 1973 "needs" survey prepared pursuant to sections 205 and 516 of the Act, it is estimated that a total national expenditure of approximately $60.7 billion is needed to install all of the municipal waste treatment facilities called for by the Act.[13] Virginia was shown to have $1.345 billion of total construction needs qualified for federal funding, with $653 million of that total being necessary just to meet the 1977 deadline for secondary or more stringent

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[12] The Virginia legislature recently adopted a resolution citing the "critical financial difficulties" faced by Virginia communities which "have been required to undertake construction of new facilities to meet the new standards promulgated by * * * federal authorities * * * but have been virtually denied the necessary grant-in-aid funds to assist with such construction," and urging the Congress to enact legislation (1) permitting states to proceed on their own to finance sewage treatment plant construction and be reimbursed later as federal funds become available (something not provided for by the Act), and (2) granting a "grace period" for compliance with the 1977 secondary treatment deadline. Va. Gen. Ass. Jt. Res. No. 50, 1974 Session (March 8, 1974).

[13] U.S.E.P.A., *Report to the Congress: Costs of Construction of Publicly-Owned Wastewater Treatment Works – 1973 "Needs" Survey Prepared Pursuant to Sections 205 and 516, Public Law 92-500* (1973). The document notes that some factors tended to make the results conservative (such as the exclusion of some types of facilities eligible for funding), while other factors tended to produce overstated estimates of needs.

treatment. The federal share (75 percent) of that $653 million is approximately $489 million, only slightly below the approximately $493 million Virginia would have received for the three-year period under a full allotment. When the roughly $244 million Virginia has actually been allotted for fiscal years 1973, 1974, and 1975 is compared with the $489 million of federal money Virginia needs to meet the rigid 1977 deadline, then the Commonwealth's plight may be appreciated.

3. The Proceedings Below

Because its interests and those of its organizers and contributors were directly affected by the Administrator's unlawful action, Campaign Clean Water filed this action on January 15, 1973. In its complaint and in a subsequent affidavit the organization alleged that its founders and financial supporters include sport and commercial fishermen, canoeists, shoreside resort owners, and others whose livelihoods or recreational activities are dependent on water quality. Many of those persons were directly affected by the Administrators's withholding of construction grant allotments. For example, Chesapeake Bay watermen, who harvest oysters, clams, and crabs from shellfish beds in the Hampton Roads region of Virginia, have frequently been unable to work the area in recent years since raw and inadequately treated sewage from two waste treatment plants operated by the Hampton Roads Sanitation District have contaminated many of those beds. In a letter filed in the District Court, Sanitation District officials informed Campaign Clean Water that the Administrator's withholding

of allotments will probably "have a very decisive impact on the capability of HRSD" to upgrade these outdated treatment facilities.[14]

On March 19, 1973, Campaign Clean Water moved for summary judgment, and the Administrator moved to dismiss the complaint on the basis of the doctrines of sovereign immunity, ripeness, and political question, and on the ground that plaintiff had failed to state a claim upon which relief could be granted. On June 5, 1973, the District Court entered a memorandum and order concluding that "the challenged impoundment policy, by which 55% of the allocated funds will be withheld, is a violation of the spirit, intent, and letter of the act and a flagrant abuse of Executive discretion." Combined Appendix to the Petitions for Writ of Certiorari 99A (hereinafter cited as "Pet. App."). In a thorough discussion of the issues, the Court first disposed of the Administrator's preliminary defenses, and then, turning to the merits of the case, focused on sections 205 and 207 of the Act and the legislative history underlying them. After noting that the "legislative history is in the main unclear, politically charged, and * * * to some degree based upon suspect constitutional interpretation of the powers of the President," the Court concluded that more weight should be attached to what the conferees did rather than to what they said in floor debates. *Id.* Thus, the Court concluded, since one of the conferees' amendments giving discretion to the Administrator was to the section on allotments, Congress must have

[14] See letter from William J. Love, Gen. Mgr. & Chief Eng'r, Hampton Roads Sanitation District, to Mr. Paul Grulier, Campaign Clean Water, April 26, 1973, filed with the Affidavit of Newton H. Ancarrow.

intended some discretion at the allotment stage, a proposition which Campaign Clean Water had advanced in its briefs. The Court noted, however, that by overriding the President's veto by a substantial margin, the Congress reaffirmed "the massive national commitment to environmental protection and the willingness to incur vast expenses in achieving that commitment." *Id.* at 99A. Concluding that the Administrator had abused his discretion by withholding more than half of the funding authorized, the Court entered a declaratory judgment holding the challenged impoundment policy null and void. It ordered the Administrator to report within ten days actions to be taken to conform the administration of the Act to the principles enunciated by the Court, *id.* at 80A, an order which was stayed by the Court of Appeals.

In his opening brief in the Court of Appeals, in addition to raising the arguments he had advanced unsuccessfully in the District Court, the Administrator contended for the first time that he was empowered to make further allotments from fiscal year 1973 and 1974 funds without regard to the deadlines for allotments contained in section 205.[15] By the time the Administrator filed his reply brief in the Court of Appeals, this new argument had become the linchpin of his position, with the November 1972 decision to allot only 45 percent of the authorized funding being characterized as an "initial allotment."

On December 10, 1973, a panel of the Fourth Circuit entered its opinion affirming in large measure the decision

[15] See the brief for the Administrator in the Court of Appeals at 34-36 n.26. This argument appeared in a discussion of ripeness, the apparent contention being that the suit was premature because further allotments were a possibility.

of the District Court, but remanding the case to the lower court for further evidentiary proceedings on the abuse of discretion question. After disposing of the questions of standing, political question, ripeness, and sovereign immunity on the basis of the District Court's opinion, the Court flatly rejected the Administrator's "position that * * * he has absolute discretion in making such allotments, and that his exercise of discretion is immune from judicial review." Pet. App. 41A. Addressing the Administrator's contention that his allotment action was "committed to agency discretion" and therefore not judicially reviewable under the Administrative Procedure Act, it noted this Court's statement in *Citizens To Preserve Overton Park v. Volpe* that this "very narrow exception" applies only in "those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Id.* at 45A, *quoting* 401 U.S. 402, 410 (1971). Observing that it is sometimes difficult to determine "'when the agency action is committed to agency discretion within the Administrative Procedure Act, and when it merely involves discretion which is nevertheless reviewable,'" Pet. App. 45A, *quoting Ferry v. Udall*, 336 F.2d 706, 711 (9th Cir. 1964), *cert. denied*, 381 U.S. 904 (1965), the Court concluded:

> Unquestionably, whether an agency in exercising its asserted discretionary power under a legislative authorization, is acting in a manner consistent with the legislative purpose and with proper regard for the constitutional principle of separation of powers between the executive and legislative is an issue that section 10 [of the APA] did not intend to make non-reviewable; it patently is not an issue "committed to agency discretion". [*Id.*].

After deciding that the Administrator's action was reviewable, the Court of Appeals went on to enunciate a standard for deciding whether the Administrator had abused his discretion:

> When the executive exercises its responsibility under appropriation legislation in such a manner as to frustrate the Congressional purpose, either by absolute refusal to spend or by a withholding of so substantial an amount of the appropriation as to make impossible the attainment of the legislative goals, the executive trespasses beyond the range of its legal discretion * * * * [*Id.* at 46A (footnote omitted)].

The Court emphasized that in determining whether the amounts withheld are excessive "[t]he Court need not seek to derive some lower figure but need simply test the contested impoundment against the legislative intent as expressed in the act to determine whether the impoundment was an abuse of discretion." *Id.* at 47A, n. 21.

Having affirmed the District Court on almost every issue, the Court of Appeals found that it could not agree with the lower court that the record supported a finding of an abuse of discretion by the Administrator. Noting that the District Court had relied on the overwhelming size of the withholding, the Court observed that the Administrator had testified before Congress that he doubted

whether the domestic construction industry could absorb greater allotments of funds, *id.* at 48A-49A; that he had asserted in his brief that not all of the funds allotted had yet been obligated by the states, *id.* at 50A; and that he claimed the power to make additional allotments from time to time, *id.* at 50A-51A. On the basis of these factors, the Court of Appeals concluded that further evidence should be taken to determine whether an abuse of discretion had in fact occurred, and, accordingly, remanded the case to the District Court. After the case had been remanded to the District Court, the Administrator filed a petition for a writ of certiorari, which was supported by respondent and was subsequently granted by this Court.

SUMMARY OF ARGUMENT

The key issue to be decided in this case is whether Congress intended to give the Administrator unbridled discretion under the Act to withhold allotments, or whether, as Campaign Clean Water contends and both of the courts below held, that discretion is limited so that the purpose and goals of the Act will be achieved. Once that fundamental question is resolved, each of the three principal defenses raised by the Administrator – sovereign immunity, nonreviewability under the Administrative Procedure Act ("APA"), and political question – are readily decided. This is true because each of these issues turns, in large part, on whether the Act imposes any expressed or implied limitations on the Administrator's allotment discretion.

Unlike the City of New York, Campaign Clean Water does not contend that the Administrator is totally without discretion to withhold allotments under section 205.

Our position, which was accepted by the Fourth Circuit, is that some such discretion was intended, but that Congress did not thereby give the Administrator the discretion to eviscerate other key provisions of the statute. Congress' overriding objective in enacting this landmark legislation was to cleanse the nation's waters of pollutants and to do so in accordance with a timetable prescribed in the statute. The detailed goals and requirements of the Act lead unavoidably to the conclusion that Congress did not override a Presidential veto in order to permit the Administrator to defeat administratively that which the Executive had been unable to defeat legislatively.

An examination of several of the Act's most important provisions demonstrates that Congress could not have intended that the Administrator have unlimited discretion. For example, the Act provides that publicly owned sewage treatment plants must achieve a secondary level of treatment by mid-1977, and must feature the "best practicable technology" by 1983. Municipalities which fail to meet these deadlines are subject to stringent federal civil and criminal penalties, as well as to suits by private citizens. The Act also requires generally that the nation's waters be of "swimmable" quality by 1983, and establishes a goal of no discharges of pollutants into waterways by 1985. And a new "contract authority" method of funding is provided so that states and municipalities can, for the first time, conduct effective long-range planning. If achieving these deadlines and other goals and requirements of the Act is jeopardized by the impoundment action of the Administrator, then his allotment discretion has been abused. Campaign Clean Water contends that the facts show such an abuse of discretion and, at the least, that it is entitled to pursue further evidentiary proceedings on this point in the District Court.

Once it is established that the Administrator's allotment discretion is limited, the defenses raised by him must fail. First, the "sovereign immunity" doctrine does not apply in suits such as this one involving "actions by officers beyond their statutory powers," *Dugan v. Rank*, 372 U.S. 609, 621 (1963), and, further, is inapplicable here because under the circumstances of this case the APA constitutes a waiver of sovereign immunity. Second, because the Administrator's allotment discretion was meant by Congress to be limited, his impoundment decision is judicially reviewable under the APA and is not one of those exceedingly rare determinations "committed to agency discretion by law." See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). Finally, since other portions of the Act provide guidance to the courts in delineating the bounds of the Administrator's allotment discretion, there is no "lack of judicially discoverable and manageable standards" which would render the Administrator's decision unreviewable on "political question" grounds. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

ARGUMENT

INTRODUCTION

Campaign Clean Water's position, which has remained unchanged since the filing of our first brief in the District Court, is that while Congress granted the Administrator some discretion to withhold allotments, his discretion is limited and has been abused. The fundamental difference between this interpretation and that advanced by the City of New York is that in analyzing the conference committee amendments to sections 205 and 207, Campaign Clean Water emphasizes what the conferees did,

while the City focuses on what the conferees said about their action during the floor debates. [16] Thus, the City concentrates on the conferees' use of such words as "obligation" and "expenditure" during the floor debates and concludes from that and other language that whatever discretion was granted was intended to be exercised at the

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[16] The difference between these two approaches to interpreting the statute was explained by the District Court in this case as follows:

> Judge Gasch in *City of New York* concluded * * * that * * * the discretionary elements incorporated into the Act and referred to by the various legislators were meant to apply to executive control over the "rate of spending," but that the rate of spending was to be monitored only at the obligation stage and not by the withholding of allotments.
>
> This Court respectfully declines to adopt this interpretation, primarily because it appears to deemphasize the syntactical history of Section 205 which shows the purposeful removal of the word "all" from §205. While the legislative debates lend strength to Judge Gasch's conclusion, the Court, the plaintiff, and, to a limited extent, the defendant, are in agreement that [the] legislative history is in the main unclear, politically charged, and in the Court's view, to some degree based upon suspect constitutional interpretation of the powers of the President. In this context the syntactical history must be given great weight * * * * The Court accordingly concludes that the Congress did intend for the executive branch to exercise some discretion with respect to allotments. [Pet. App. 95A-96A (footnote omitted)].

obligational stage of the funding process. Campaign Clean Water, on the other hand, considers the floor debates to be "in the main unclear [and] politically charged," Pet. App. 96A, and accordingly places considerable weight on the fact that it was the section on allotments (§205) rather than the section on obligations (§203) that was amended by the conferees. [17]

The Administrator's case must stand or fall on a premise which he carefully avoids stating in his brief – that his discretion to withhold allotments is totally unfettered. [18]

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[17] Although it may be difficult to predict what practical effect the choice of one interpretation over the other might have, it is probable that adopting the City of New York's position could lead to further litigation. As the Administrator points out in his brief (p. 14), "[I]f this Court should hold that the entire amount authorized must be allotted at the outset, the Administrator, in consultation with the President, will then have to decide whether to exercise his authority to impose comparable obligation controls for the same purpose." Thus, a victory on the ground urged by the City might well be a pyrrhic one, with further litigation being necessary to pry loose funding at the obligational stage. If, on the other hand, our "abuse of discretion" argument prevails, the need for later litigation would probably be obviated, since a holding that Congress intended the Administrator to exercise his limited discretion at the allotment stage would implicitly preclude him from taking a second bite from the apple at the obligational stage. The District Court, in fact, agreed, stating that "the Court concludes that the declaratory relief issued with respect to the allotment stage will place the defendant on notice that a similarly designed and motivated impoundment policy with respect to appropriations [i.e., obligations] would contravene the letter and spirit of the Act." Pet. App. at 100A.

[18] The Administrator was not nearly so cautious in the Court of Appeals where he bluntly argued "that Congress placed *no limitation* upon the President's or the Administrator's discretion to allot and spend funds * * *" Brief for the Administrator in the Court of Appeals at 24 (emphasis added).

It is not surprising that the Administrator has taken such pains to conceal the underpinnings of his argument, for an examination of the statute and its legislative history makes clear that Congress could not have intended the Administrator's discretion to be unbridled and that such a construction would utterly vitiate many important provisions of this landmark legislation.

I. CONGRESS DID NOT INTEND TO GIVE THE ADMINISTRATOR UNBRIDLED DISCRETION TO WITHHOLD ALLOTMENTS

In determining whether Congress intended to give the Administrator unlimited discretion to withhold allotments, two factors make a sensible reading of the statute difficult. First, a monkeywrench of no small proportions was thrown into the delicately tuned machinery of this complex legislation when the conferees added an eleventh hour amendment aimed at reaching a political compromise with the White House on the issue of spending control. In seeking to accommodate this last minute surgery with the remainder of the ninety-page statute, the courts must be careful to ensure that the rest of the statute is not undermined.

The other aspect of this legislation which complicates the problem of discerning congressional intent as to the extent of the Administrator's impoundment discretion is that the floor debates were colored by the intensely political dispute that was then raging between the President and the Congress concerning what came to be known as "the Battle of the Budget." As the conference committee deliberations on the water pollution bill drew to a close in late September 1972, no issue was more hotly debated in Congress than the President's power to control the level

of federal spending.[19] Because S. 2770, the water pollution bill, was viewed as a threat to the President's policy on control of federal spending, the ranking Republican on the House Public Works Committee, Representative Harsha, reported to the final meeting of the conferees that the President would be less likely to veto the bill if it were amended to grant the Executive the discretion to spend less than the full $18 billion authorized, L.H. 165-66, after which the amendments relied on by the Administrator were adopted. The amendments themselves – removing the word "all" from section 205 and inserting the phrase "not to exceed" in three places in section 207 – hardly provide any penetrating insight into congressional intent. Standing alone, they suggest only that Congress intended that some amount less than the full sums authorized could be allotted. They do not by themselves give the Administrator a green light to reduce by more than half the level of funding.

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[19] Most of the debate centered around a bill endorsed by the President and introduced by Representative Mills and others on September 26, 1972 – two days before the conference committee issued its report on the water pollution bill, S. 2770 – which would have imposed a $250 billion ceiling on federal spending and would have given the President extremely broad powers to impound appropriated funds. See H.R. 16810, 92d Cong., 2d Sess. (1972); 118 Cong. Rec. S 18026-120 (daily ed. Oct. 13, 1972); H 10224-34, S 18506-33 (daily ed. Oct. 17, 1972); H 10277-84, S 18632-33, S 18646-47 (daily ed. Oct. 18, 1972). The spending ceiling/impoundment provisions of the bill were ultimately defeated; in fact, showing its displeasure with impoundment, Congress added a provision to the bill requiring the President to report all impoundments to the Congress. Federal Impoundment and Information Act, Pub. L. No. 92-599, §§401-402, 86 Stat. 1325, *repealed by* the Impoundment Control Act of 1974, Pub. L. 93-344, tit. X, 88 Stat. 297, 332 (imposing even more stringent controls on impoundment).

Unfortunately, no statement of the conferees' intent with respect to these amendments was included in the committee report, which would generally be considered the most reliable indicator of congressional purpose. See *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 447 (1920). Instead, the explanation of their action was left to floor statements, where each of the opposing factions could spread on the record its interpretation of the effect of the changes. The manner in which this legislative history was created demonstrates that it was the product of a strained political compromise. The President's advocates must have known that they could not "sell" the Congress explicit statutory language giving the President *total* spending discretion, while the sponsors of the bill must have known that they had no chance of avoiding a veto if the statute expressly denied the Executive *any* such discretion. The result was two rather cryptic changes in the wording of sections 205 and 207, which left both sides room to argue their varying interpretations of the amendments on the floor. Thus, in the floor debates, Senator Muskie was free to offer a very narrow and somewhat curious construction of the conference committee's intent, suggesting that the Administrator could only withhold funding for individual projects which failed to comply with the requirements of the National Environmental Policy Act, L.H. 166, *quoted* at p. 11, *supra*, while the House Republican spokesman, Representative Harsha, implied sweepingly that the Administrator could allot "anything" up to the amounts authorized, L.H. 247, *quoted* at p. 11, *supra*.

It is small wonder that a legislative history charged with such political byplay provides unreliable guidance to a court attempting to discover the intent of Congress. As one former Solicitor General has noted in an analogous

context, "[t]he legislation contains more than its share of problems for judicial interpretation because * * * many sections contain calculated ambiguities or political compromises essential to secure a majority. Consequently, in resolving them the courts would be well advised to seek out the underlying rationale without putting great emphasis upon close construction of the words." Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 852 (1960), *quoted in*, *Wirtz v. Local 153, G.B.B.A.*, 389 U.S. 463, 468 n.6 (1968); see also *Rosado v. Wyman*, 397 U.S. 397, 412 (1970); *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 11 (1968); *National Woodwork Manufacturers Ass'n v. N.L.R.B.*, 386 U.S. 612, 639 (1967). Given a statute containing potentially disruptive provisions that were tacked on almost as an afterthought, as well as floor debates that must be taken with an appropriate grain of salt, the clear duty of this Court is to "look to the reason of the enactment, and inquire into its antecedent history, and give it effect in accordance with its design and purpose * * *" *Ozawa v. United States*, 260 U.S. 178, 194 (1922).

One piece of such "antecedent history" that is of cardinal importance in this case is the veto override. In explaining his veto, the President, who had fought against S. 2770 from the outset, threw down the gauntlet to the Congress on the issue of construction grant spending. L.H. 137-39. He denounced the bill as "budget-wrecking" and insisted that the much more modest bill he had championed – wholly without success – provided a preferable alternative. *Id.* at 138. Despite the President's displeasure, both houses of Congress voted overwhelmingly to override. They did so with the full knowledge that the sums

authorized were immense and that increased taxation might be necessary. See the statement of Representative Harsha, quoted at pp. 13-14, *supra*. When those legislators voted to override, they cannot have contemplated that the President would be permitted to achieve by impoundment what he had failed so decisively to achieve in the congressional arena. Yet that will be the effect if the Administrator's position is upheld by this Court, since several of the most crucial provisions of this important legislation, all opposed by the President during the bill's pendency, would be severely frustrated by a holding that there are no limits on the Administrator's impoundment discretion.

Among the most obvious of these provisions are those contained in Title III of the Act, which establishes deadlines dictating the time by which certain levels of sewage treatment must be achieved, makes these deadlines and levels legally enforceable in a variety of ways, and prescribes sanctions for their violation. Section 301(a) provides in pertinent part that "[e]xcept as in compliance with this section * * * the discharge of any pollutant by any person ["person" including a state or a municipality under section 502(5)] shall be unlawful." Subsection (b) of that section provides that in order to carry out the Act's objective of restoring the nation's waters to their natural state, publicly owned treatment works in existence on July 1, 1977, or under construction and approved by the Administrator prior to June 30, 1974, must be able to meet effluent limitations based upon secondary treatment, or in some cases upon even more stringent standards. §§301(b)(1)(B), (C). And by July 1, 1983, all publicly owned treatment works approved after mid-1974 must employ "the best practicable technology." §§301(b)(2)(B), 201(g)(2)(A).

The importance that Congress attached to the 1977 deadline for achieving secondary treatment is evidenced by the fact that the conference committee rejected section 301(b)(3) of the House bill, L.H. 964-65, that would have given the Administrator discretion to extend this deadline for up to two years.[20] Further evidence of Congress's determination tnat this deadline be met is provided by the enforcement section of the statute. Under sections 309(a)(1) and (3) whenever the Administrator finds that any person is in violation of an effluent limitation under section 301 – which would include effluent limitations based on the secondary treatment requirement – he *shall* either issue an enforcement order requiring compliance, initiate a civil action for injunctive relief, or notify both the alleged violator and the appropriate state agency of the violation.[21] If he chooses the latter of these three courses, the Administrator must still proceed to issue an enforcement order or to bring a civil action if the state "has not commenced appropriate enforcement action" within 30 days. If a municipality violates either section 301, an effluent limitation in a permit, or an enforcement order of the Administrator, it is subject to a civil penalty not to exceed $10,000 per day of violation, and, if the violation is willful or negligent, it may be punished by a

[20] That same section also authorized the Administrator to extend for a two-year period the deadline for compliance with certain standards by industrial polluters. While rejecting the provision with respect to municipal waste treatment works, the conferees accepted in substance the provision authorizing the postponement of certain deadlines for industrial sources of pollution. See §301(c).

[21] The Administration bill made enforcement by the Administrator discretionary. See *Senate Hearings*, *supra* note 2, at 317-18.

criminal fine of from $2,500 to $25,000 per day.[22] §§309(c)(1), (d).

Not only are municipalities subject to enforcement action by the Administrator, but they are subject to civil actions by citizens under section 505 to enjoin the violation of either an effluent standard or of an order issued by the Administrator or a state with respect to such a standard. Successful litigants may obtain, in addition to injunctive relief, their costs of litigation, including attorney and expert witness fees. §505(d).

There can be no doubt that one of Congress's chief purposes in authorizing the appropriation of $18 billion for sewage treatment plant construction was to enable municipalities to comply with the rigid 1977 and 1983 deadlines and thereby to avoid being taken to court by either the Administrator or private litigants. This congressional intent is evidenced in the remarks of Senator Muskie, the bill's sponsor, when he noted during the veto override debate that under the new law "advanced waste treatment, a level of treatment not generally required under existing law, will be required for every community in the Nation. That * * * is a tall order. To set a level of funding which would enable communities to meet it, we examined the information we had received from both

[22] It is abundantly clear that Congress contemplated that municipalities would be sued under the civil penalties provision since section 309(e) provides that "[w]henever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment * * * entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment."

the administration and from the municipalities themselves." L.H. at 121. Senator Muskie continued: "[T]he conferees decided that $18 billion was the required level of funding for Federal grants. None of us were pleased that the price tag is that high, but none of us are prepared – as the President is – to back off from the challenge by claiming we cannot afford to pay that price."[23]

The Administrator, too, foresaw that municipalities could not be expected to meet the deadline for secondary treatment unless ample federal grant money was forthcoming. In a letter written to the Chairman of the House Public Works Committee in December 1971, he urged that "the secondary treatment requirement should only apply to projects for which new Federal grants are provided." L.H. 1197. Congress rejected that recommendation, thus evidencing its intent that all municipalities meet the 1977 deadline, a result that is concededly impossible without sufficient federal financial assistance.

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[23] L.H. 122. In a similar vein, Republican Senator Cooper stated:

> The great commitment [we have made to the American people in this bill] is found in those provisions which require compliance with the bill. The municipal facilities are required to come into compliance with this bill. If they do not, sanctions may be taken against the municipality.
>
> • • • •
>
> I must say that since we have ordered these strict restrictions • • • that is the chief commitment, and we must live up to it, whether by contract authority or by appropriations. [L.H. 1373].

In summary, the last-minute amendment of the conference committee cannot be construed as giving the Administrator unlimited discretion without effectively nullifying much of Title III. It is unthinkable that Congress would, on the one hand, require cities to conduct crash construction programs, and subject them to both governmental and private enforcement actions, as well as civil and criminal penalties, for failing to do so, while at the same time giving the Administrator unfettered license to pull the rug from under municipalities by impounding most of the funds provided to pay the federal share. Usual rules of statutory construction dictate that when confronted with such potentially inconsistent statutory provisions, courts seek to reconcile any conflicts so as to give effect to all parts of the legislation. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). Accordingly, the only reasonable interpretation of the Act is that while Congress intended to give the Administrator some discretion to impound, it did not intend that discretion to be so unlimited as to render impossible compliance by municipalities with the 1977 and 1983 deadlines imposed by section 301.

The provisions of section 301 are not the only ones in the Act that would be rendered meaningless if the Administrator's position were to be accepted by this Court. Section 101 provides that in order to achieve the Act's objective of "restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters":

> (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
>
> (2) it is the national goal that wherever attainable, an interim goal of water quality

> which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983 * * *

While the first of these goals, the "no discharge" goal, was described in the legislative history as being a general, non-enforceable "policy objective," see L.H. 1262, 1299-1301, the July 1, 1983, "swimmability" standard is quite concrete and was clearly intended by the Congress to be achieved. As then Council on Environmental Quality ("CEQ") Chairman Russell Train stated in testimony before the House Public Works Committee in December 1971, "[t]his concept of 'swimmability' is a fairly accepted scientific standard relating to bacterial count * * * It is measurable scientifically and can be instrumented, and it is an accepted definition that can be applied * * * *" L.H. 1148-49. Moreover, this deadline coincides exactly with the rigid mandatory deadlines established by section 301(b)(2), which requires that by July 1, 1983, municipal treatment works use "the best practicable technology" and that industrial dischargers employ "the best available technology." Recognizing the stringency of the "swimmability" requirement, see L.H. 1135-36, Administration spokesmen asked the House Public Works Committee to amend the provision by substituting for the word "attainable" the phrase "feasible and appropriate." Congress rebuffed the Administration's attempt to weaken the 1983 "swimmability" goal, thus affirming that it meant the deadline to be binding and to be met "wherever attainable."

Like the 1977 secondary treatment requirement and the 1983 "best practicable technology" requirement, the national goal of achieving "swimmable" water quality was

envisioned by Congress as being linked closely to the Title II provisions providing funding for the waste treatment plant construction grant program. The first section of Title II states that "[i]t is the purpose of this title to *require* and to assist the development and implementation of waste treatment management plans and practices *which will achieve the goals of this Act.*" §201(a) (emphasis added). In addition, section 207, which authorizes the appropriation of $18 billion for construction grants, expressly provides that the purpose of that section is "*to carry out* this title." (Emphasis added). This important national goal cannot be "carried out," however, if the Act is interpreted as giving the Administrator unlimited discretion to impound.

A third major portion of the Act that has been subverted by the Administrator's massive impoundment is the contract authority provisions of Title II (§§203, 205), one of the most important features of the entire statute. A major problem under the prior construction grant program was the inability of recipients to forecast with certainty when and in what amounts future federal funding would become available. Despite the Administration's opposition, see note 10, *supra*, the Congress approved a contract authority funding mechanism so that states and municipalities would know well in advance how much federal funding would be available in future fiscal years, making long-range planning possible. The importance of this provision was explained by Representative Harsha, who said "it is essential that the States, the interstate agencies and the cities have both the ability for and a basis for long-range planning, construction scheduling and financing waste treatment plants, including the sale of bonds that they have to sometimes negotiate." L.H. 632-33. However, where Congress

exhibited an overriding concern for certainty and predictability, the Administrator has introduced chaos by withholding large amounts of funds from allotment. No longer can a state seeking to plan for its construction needs a few years hence know with any certainty how much federal funding will be available for obligation.

Ignoring all of these other goals and requirements, the Administrator carefully avoids discussing in his brief what effect his impoundment action would have on the other provisions of the Act. That is not surprising since the Administrator's portrayal of his powers under sections 205 and 207 is totally at variance with both the plain language of the Act and the overall statutory scheme. Instead, the Administrator argues that the November 1972 allotment of only 45 percent of the funding for fiscal years 1973 and 1974 was merely an "initial allotment," that he is empowered to make further allotments, and that grantees have not really been harmed. Br. 12-14, 25-28. [25] He also assures us that he "expects ultimately

[25] In an attempt to give substance to his claim that no harm has been done, the Administrator makes much of the fact that no state has yet obligated all of the funds allotted for fiscal years 1973-75. The principal shortcoming of this argument is that since the Administrator controls the rate of obligation, see §§203, 204, he can easily make it appear that few allotted funds are being committed by simply subjecting applicants to more "red tape." In his October 1972 letter to the Office of Management and Budget arguing against a veto, then-Administrator Ruckelshaus suggested the use of such administrative manipulation to slow the rate of obligations. L.H. 153, 155-56. Furthermore, recent hearings before a subcommittee of the House Public Works Committee disclosed that the main reason the states have not obligated far more money is because of bureaucratic foot-dragging by EPA. See 120 Cong. Rec. H 788 *et seq.* (daily ed. Feb. 13, 1974) (statement (continued)

to release the full $18 billion," Br. 29, although we are not told when.

This construction is of doubtful validity on several grounds. First, to hold that the Administrator may make allotments from time to time, as he deems fit, would be to undercut completely the laboriously constructed statutory scheme for advance funding, since states could not know what allotments would be available for obligation in future years. Second, this interpretation flies in the face of the plain language of the Act. Section 205(a) makes no mention of any "initial" allotment, but obviously contemplates a single allotment for each fiscal year, to be made before the preceding January 1st. Moreover, section 205(b)(1), which provides that sums allotted to a state must be obligated by the end of the fiscal year following that for which allotted or they will be lost to other states through reallotment, makes no sense at all if the Administrator's position is sustained. [26] Third, there

[25] (continued) by the chairman of the subcommittee citing "an almost unbelievable proliferation of administrative red tape" resulting in the approval by EPA of only $33 *million* worth of construction during the last five months of 1973).

[26] The Administrator argues that, section 205(b) notwithstanding, impounded funds do not lapse at the end of the following fiscal year, Br. 13 n. 2, 25, and that even if they do, "the only difference would be that Congress would have another occasion to examine the issues related to amounts and rate of spending under the program." Br. 25 n. 9. This blithely ignores that the reason Congress adopted "contract authority" (continued)

is absolutely no evidence that the Administrator actually plans to make further allotments, and his own regulations concerning allotment do not even provide for such an event. See 39 Fed. Reg. 1847-48 (Jan. 15, 1974).

In summary, it is clear that Congress could not have intended the Administrator's impoundment discretion to be unlimited or to be exercised in the manner he suggests. Each of the three portions of the Act examined above – the 1977 and 1983 deadlines of section 301, the 1983 national goal of "swimmable" waters, and the "contract authority" provisions of Title II – were considered by Congress to be of central importance and were enacted over the Administration's strenuous opposition and even over the President's veto. It is unthinkable that the executive branch should now be able to subvert by a policy of massive impoundments the very provisions it fought so persistently and so unsuccessfully in the legislative process. The Fourth Circuit, in short, was clearly correct in holding that when the executive withholds "so substantial an amount * * * as to make impossible the attainment of the legislative goals," then it has "trespasse[d] beyond the range of its legal discretion," presenting "an issue of constitutional dimensions which is obviously open to judicial review." Pet. App. 46A-47A.

It is not necessary for this Court to go further and decide that the Administrator's limited discretion has been abused, although Campaign Clean Water believes that the circumstances clearly support such a conclusion. EPA's own recent 1973 "needs" survey showed that Virginia

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[26] (continued) funding rather than employing the usual annual appropriations process was that it wanted federal funding *not* to be subject to periodic reassessment by Congress.

would have to spend $1.345 billion for constructing sewage collection and treatment facilities eligible for funding under the Act in order to comply with the intent and purpose of the Act in all respects related to waste treatment. Even if Virginia were to do no more than bring its waste treatment plants up to the secondary or more stringent levels required to be achieved by mid-1977, the Commonwealth would have to expend $653 million. The federal share of that amount of construction would total about $489 million, far more than the approximately $244 million that has been allotted to Virginia by the Administrator for fiscal years 1973, 1974, and 1975. If, however, the Administrator had allotted the full amounts authorized under section 207, Virginia would have received over $493 million, slightly more than EPA estimates the Commonwealth will need to meet the 1977 requirement. It is in the face of this utterly inadequate level of federal financial assistance that the Commonwealth has finally been forced to go to court to seek relief from the plight in which it finds itself as a result of the Administrator's unlawful action. In light of circumstances such as these, the case for finding an abuse of discretion seems compelling.

II. THIS ACTION IS NOT BARRED BY SOVEREIGN IMMUNITY, DOES NOT INVOLVE A DETERMINATION "COMMITTED TO AGENCY DISCRETION BY LAW," AND POSES NO "POLITICAL QUESTION"

A. This Action is Not Barred by Sovereign Immunity

The Administrator's chief defense to this action is an argument, rejected with virtual unanimity by the lower courts in this and a host of similar "impoundment

cases,"[27] that the doctrine of sovereign immunity precludes the courts from reviewing his decision to withhold more than half of the construction grant funding authorized by Congress under the Act. The Administrator does not raise the sovereign immunity defense with respect to the City of New York since he concedes that, if the Act gives him no impoundment discretion, the courts may order him to do the statute's bidding. Br. at 14, 37-38. But he argues that once it is determined he has *some* discretion to withhold allotments, no matter how limited, then he is free to work his will with the program, and his decision is immune from judicial scrutiny.

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[27] See, *e.g.*, *State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1123 (8th Cir. 1973) (*per curiam* opinion denying Government's petition for rehearing en banc); *State Highway Dep't v. Volpe*, No. 72-940 (D.S.C., decided May 7, 1974); *National Ass'n for Mental Health, Inc. v. Weinberger*, No. 1812-73 (D.D.C., decided Feb. 7, 1974); *National Ass'n of Regional Medical Programs v. Weinberger*, No. 1807-73 (D.D.C., decided Feb. 7, 1974); *Pennsylvania v. Weinberger*, 367 F. Supp. 1378, 1379 (D.D.C. 1973); *People ex rel. Bakalis v. Weinberger*, 368 F. Supp. 721, 724 (N.D. Ill. 1973); *Louisiana v. Weinberger*, 369 F. Supp. 856, 861-62 (E.D. La. 1973); *Texas v. Fri*, No. A-73-CA-38 (W.D. Tex., decided Oct. 2, 1973); *Brown v. Ruckelshaus*, 364 F. Supp. 258, 260-61 (C.D. Cal. 1973); *Community Action Program Executive Directors Ass'n of N.J. Inc. v. Ash*, 365 F. Supp. 1355, 1361-62 (D.N.J. 1973); *Dotson v. Butz*, No. 1210-73 (D.D.C., decided Aug. 3, 1973); *National Council of Community Mental Health Centers, Inc. v. Weinberger*, 361 F. Supp. 897, 900 (D.D.C. 1973); *Pennsylvania v. Lynn*, 362 F. Supp. 1363, 1368-69 (D.D.C. 1973), *rev'd on other grounds*, ___ F.2d ___ (D.C. Cir. No. 73-1835, decided July 19, 1974); *Martin-Trigona v. Ruckelshaus*, No. 72-C-3044 (N.D. Ill., decided July 9, 1973); *Minnesota v. United States Environmental Protection Agency*, No. 4-73 Civ. 133 (D. Minn., decided June 25, 1973); *Mason v. DeGeorge*, No. 73-436-N (D. Md., decided May 31, 1973), *rev'd on other grounds*, 483 F.2d 521 (4th Cir. 1973); *Local 2677, A.F.G.E. v. Phillips*, 358 F. Supp. 60, 68-69 (D.D.C. (continued)

It should come as no surprise that the sovereign immunity argument has fared so poorly in lower court impoundment cases since the policies underlying that fading doctrine would not be advanced by its application in such situations and would run counter to this Court's repeated admonition that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). See also *Barlow v. Collins*, 397 U.S. 159, 166-67 (1970); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 156-57 (1970); *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962). The "general rule" of sovereign immunity has been stated as follows: "[A] suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' * * * or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (citations omitted). Courts in modern times have indicated that the rationale for sovereign immunity is twofold: to assure that the disposition of Government property is controlled by the Congress rather than the courts, see Art. IV, Sec. 3, Cl. 2 of the Constitution (granting Congress the power to control the disposition of Government property), and *Knox Hill Tenant Council v.*

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[27] (continued) 1973); *Berends v. Butz*, 357 F. Supp. 143, 149 (D. Minn. 1973). But cf. *Housing Authority v. United States Dep't of Housing and Urban Development*, 340 F. Supp. 654 (N.D. Cal. 1972) (holding that sovereign immunity applies where the Secretary of HUD acted within his statutory powers in impounding grant funds at the direction of the President under a statute, 42 U.S.C. §1453, which provided the Secretary with discretionary authority to make grants only "with the approval of the President").

Washington, 448 F.2d 1045, 1052 (D.C. Cir. 1971), and that the Government is not "stopped in its tracks" by undue judicial interference with the governmental process, see *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 714-15 (1949).

It has long been recognized, of course, that these aims must be balanced against the countervailing policy of allowing persons who are affected by governmental decision-making to obtain judicial review of the claimed unlawful excesses of federal officials. Thus, this Court has fashioned two exceptions to the general rule of sovereign immunity so that plaintiffs may obtain relief against a governmental official where they claim either that he has acted beyond the limits of his statutory authority or in an unconstitutional manner. See *Dugan v. Rank, supra*, 372 U.S. at 621-22. It is Campaign Clean Water's position that this case is governed by the exception for actions of a government official in excess of his statutory authority – here the authority to allot funds under section 205. Therefore, the Administrator can prevail on the sovereign immunity issue only if he can demonstrate that his impoundment discretion under the Act is unlimited. If, as we have shown already in Part I above, there are limits to his discretion, then he is not protected by sovereign immunity unless it is ultimately established that he acted within those limits in impounding more than half of the funding authorized by Congress.[28] In addition, we contend

[28] In determining whether either of the two exceptions to the sovereign immunity doctrine applies in an action against a governmental official, it has been held that the court must decide the merits – *i.e.*, whether the official acted within the scope of his statutory authority – before it may dispose of the sovereign (continued)

that, at least under the circumstances of this case, the APA constitutes a waiver of sovereign immunity; to hold otherwise would be to undermine seriously this vital statute.

1. This Case is Within the Exception to Sovereign Immunity for Suits Against Officials Who Have Exceeded Their Statutory Authority

The Administrator's argument that this case does not fall within either of the exceptions to sovereign immunity rests on three grounds: first, that once it is acknowledged that he has some limited impoundment discretion, even his actions in excess of such limits are immune from review, Br. 34-36; second, that since the complaint does not allege unconstitutional conduct by the Administrator, the exception for unconstitutional acts does not apply, Br. 36-37; and third, that dictum contained in footnote 11 in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949), creates an "exception to the exceptions" in suits concerning the disposition of Government property, Br. 37-38. Campaign Clean Water does not dispute the second of these contentions – we rely only on the exception for acts in excess of statutory authority; but we strongly disagree with the first and third arguments.

In advancing his first claim, the Administrator explains his position as follows:

28 (continued) immunity question. See *Land v. Dollar*, 330 U.S. 731, 735, 739 (1947); *Carter v. Seamans*, 411 F.2d 767, 770 (5th Cir. 1969), *cert. denied*, 397 U.S. 941 (1970); *Anderson v. Seaman*, 252 F.2d 321, 322-23 (5th Cir. 1958). But cf. *Bell v. Hood*, 327 U.S. 678 (1946).

> [O]nce it is acknowledged that the Administrator has discretion to allot less than the full amounts authorized, his discretionary act of determining the total amount to be initially allotted cannot be beyond his "statutory powers." Even assuming *arguendo* that it may involve error in exercising those powers, it is still within them and not beyond them. It is necessarily an exercise of those powers.[29] [Br. 34].

This argument appears to boil down to an assertion that once Congress has given the Administrator some discretion to impound, no matter how limited, he is free to trample the boundaries Congress has erected and implement the Act only to the extent he pleases and that the doctrine of sovereign immunity prevents a court from reviewing his actions. In other words, while the Administrator concedes that if Congress directs him to allot 100 percent of the authorized funds, he must do so, he argues that if, for example, Congress specifically granted him the discretion to allot "between 90 and 100 percent" of the authorized amounts, he could allot 45 percent with impunity.

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[29] This argument appears to run counter to this Court's formulation of the procedure to be followed where, as here, judicial review is available under the APA:

> Scrutiny of the facts does not end * * * with the determination that the Secretary has acted within the scope of his statutory authority. Section 706(2)(A) [of the APA] requires a finding that the actual choice made was not "* * * an abuse of discretion, or otherwise not in accordance with law." [*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)].

(continued)

To support this rather novel argument, the Administrator relies primarily on language from the opinion for the plurality in *Larson v. Domestic & Foreign Commerce Corp., supra*. In that case, a corporation which had contracted with the War Assets Administration to purchase surplus coal owned by the Government sued the head of the Administration claiming that he had acted "illegally" by selling the coal covered by the contract to another. The corporation sought specific relief rather than damages, asking that the Administrator be enjoined from delivering its coal to the other buyer. Significantly, the corporation did not allege any limitation on the officer's statutory authority to sell coal that would render his action unlawful, nor did it allege an unconstitutional taking of its property. 337 U.S. at 691-92, 703. Rather, it merely alleged that it had acquired title to the coal when the contract was executed and that the sale of the coal to a third party was tortious and, hence, "illegal." It is in this context that the following statement from *Larson* quoted by the Administrator in his brief at page 35 must be examined:

> *There is no allegation of any statutory limitation on his powers as a sales agent. In the absence of such a limitation* he, like any other sales agent, had the power and the duty to construe such contracts and to refuse delivery in cases in which he believed that the contract

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[29] (continued) See also *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1911), which was heavily relied on in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) (action against Secretary of War held not to be barred by sovereign immunity where "[t]he suit rests upon a charge of abuse of power," even though the statute granted the Secretary broad discretion).

> terms had not been complied with. His action in so doing in this case was, therefore, within his authority even if, for purposes of decision here, we assume that his construction was wrong and that title to the coal had, in fact, passed to the respondent under the contract. [337 U.S. at 703 (emphasis added)].

Here, as we have shown in Part I above, there has been a violation of a statutory limitation that was not even alleged, let alone proven, in *Larson*.

Equally without merit is the Administrator's other ground for contending that the exception for actions in excess of statutory authority does not apply in this case. Simply stated, the Administrator's argument is that when the relief sought in a suit against a federal official entails the disposition of Government property, the two exceptions to sovereign immunity do not apply.[30] He bases this argument on the following *dictum* from footnote 11 in *Larson*:

[30] The Administrator limits the scope of his argument to suits where the official's power to dispose of the sovereign's property is discretionary, acknowledging that where the duty to dispose of property is ministerial the courts have generally permitted the maintaining of a mandamus action to compel its disposition. Br 37-38. However, several courts have held that 28 U.S.C. §1361, the modern successor to mandamus, "* * * was intended to permit District Courts generally to issue appropriate corrective orders where federal officials are not acting within the zone of their permissible discretion but are abusing their discretion or otherwise acting contrary to law. * * *" *Peoples v. United States Dep't of Agriculture*, 427 F.2d 561, 565 (D.C. Cir. 1970). See *Miller v. Ackerman*, 488 F.2d 920, 921-22 (8th Cir. 1973); *United States ex rel. Schonbrun v. Commanding Officer*, 403 F.2d 371, 374 (2d Cir. 1968), *cert. denied*, (continued)

> Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. North Carolina v. Temple, 134 U.S. 22 (1890). [337 U.S. at 691, n.11].

Although it has engendered floods of commentary, generally critical, from the lower courts[31] and from legal scholars[32] neither footnote 11 nor its thesis has since been referred to in any decision of this Court. Nor does an analysis of this Court's more recent sovereign immunity decisions yield any clear answer to the question whether

[30] (continued) 394 U.S. 929 (1969). See also *Work v. United States ex rel. Rives*, 267 U.S. 172, 177 (1925) (stating, in a mandamus case: "The duty may be discretionary within limits. [The officer] cannot transgress those limits, and if he does so, he may be controlled by injunction or mandamus to keep within them").

[31] See, *e.g.*, *Schlafly v. Volpe*, 495 F.2d 273, 278-80 (7th Cir. 1974); *State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1123 (8th Cir. 1973) (*per curiam* opinion denying Government's motion for rehearing en banc); *Knox Hill Tenant Council v. Washington*, 448 F.2d 1045, 1052-53 (D.C. Cir. 1971); *Washington v. Udall*, 417 F.2d 1310, 1317 (9th Cir. 1969).

[32] See, *e.g.*, L. Jaffe, Judicial Control of Administrative Action 226-27 (1965); K. Davis, Administrative Law Treatise 901 *et seq.* (Supp. 1970); Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich. L. Rev. 387, 414-15 (1970).

footnote 11 has continuing vitality, although this Court's rulings in related areas suggest that it does not.

It has been more than a decade since this Court dismissed a suit against a federal official on the grounds that his action was protected by sovereign immunity; it last did so in four cases decided in 1962 and 1963. Seemingly, the "exception to the exception" announced in footnote 11 of *Larson* should have been dispositive of all of these cases, if it were then still considered "good law." However, it was mentioned in none of them.

In *Malone v. Bowdoin*, 369 U.S. 643 (1962), it was held that plaintiffs were barred by sovereign immunity from maintaining an action of ejectment against a forest service officer of the United States Department of Agriculture seeking the return of land occupied by the officer and claimed by the plaintiffs. Since the action, if successful, would have resulted in the disposition of Government property, presumably footnote 11 should have controlled, and the action should have been dismissed without inquiry into whether the two exceptions to sovereign immunity applied. Yet the Court did not mention the rule of footnote 11, but instead held that dismissal was appropriate, noting plaintiffs' failure to allege an unconstitutional taking or a breach of statutory authority or to pursue their damage remedy in the Court of Claims. 369 U.S. at 647-48 & n.8.

In *Dugan v. Rank*, 372 U.S. 609 (1963), and *City of Fresno v. California*, 372 U.S. 627 (1963), water rights claimants were barred from suing officials of the United States Reclamation Bureau to enjoin them from storing or diverting the flow of the San Joaquin River without first erecting a series of ten small dams to assure that

plaintiffs were supplied with a level of water equivalent to the natural flow of the stream. The Court observed that the effect of granting the requested relief would be either to force the abandonment of a dam project for which Congress had already made appropriations or to require both affirmative action and the disposition of Government funds by compelling the construction of ten small dams. It again seems that footnote 11, if still vital, would have controlled and would have warranted dismissal without reference to the exceptions to sovereign immunity, but only after undertaking a lengthy discussion of the exceptions did the Court conclude that sovereign immunity applied.[33] *Id.* at 621-23. As in *Malone*, the Court also emphasized that plaintiffs were free to pursue an action for damages. *Id.* at 626.

In each of these three cases, as in *Larson*, plaintiffs sought specific relief, such as the transfer of a parcel of land or the construction of dams. They chose to ignore the damage remedy that Congress had provided for them and sought instead to compel drastic governmental action. It is thus easy to understand why the Court in *Dugan*, for example, was reluctant to grant relief requiring the Government either to abandon a project that Congress wanted built or to embark on a major new construction program, which Congress would also have to finance. In this case, by contrast, the intent of Congress will be thwarted if the requested relief is *not* granted, and, moreover, respondents here have no Tucker Act remedy for damages. Thus, these three cases, with their reliance on the usual exceptions to

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[33] One Court of Appeals has construed *Dugan* as casting doubt on the continued validity of footnote 11. *Turner v. Kings Rd. Conservation Dist.*, 360 F.2d 184, 189 (9th Cir. 1966).

sovereign immunity rather than on Larson's footnote 11, indicate that the "exception to the exception" has nowhere near the compelling force of law that the Administrator's brief suggests.

The last of this Court's most recent sovereign immunity cases, *Hawaii v. Gordon*, 373 U.S. 57 (1963), also fails to rely on footnote 11, although it must be acknowledged that its rationale in terms of prior sovereign immunity decisions is difficult to ascertain. The State of Hawaii filed an original action in the Supreme Court against the Director of the Bureau of the Budget, to whom the President had delegated his responsibility under the Hawaii Statehood Act to determine whether certain land in Hawaii belonging to the United States was still needed by the Government, and, if not, to convey it to the State. In carrying out his delegated function, the Director interpreted the statute not to apply to lands that had been obtained by the United States through purchase, condemnation or gift, a construction with which the State disagreed. In a brief *per curiam* opinion, this Court dealt with the sovereign immunity issue in three sentences:

> We have concluded that this is a suit against the United States and, absent its consent, cannot be maintained by the State. The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter [Citing *Dugan*, *Malone*, and *Larson*]. Here the order requested would require the Director's official affirmative action, affect the public administration of government agencies and cause as well the disposition of property admittedly belonging to the United States. [373 U.S. at 58].

The opinion in *Hawaii*, which has been severely criticized by some commentators,[34] does not mention the two exceptions to sovereign immunity or explain their inapplicability. It may be that, as has been said of other decisions on sovereign immunity, "policy considerations, not * * * apparent on the surface, [were] powerful agents of decision." *Malone v. Bowdoin*, 369 U.S. 643, 650 (1962) (Douglas, J., dissenting). Among such considerations may have been that since the Director had unlimited statutory discretion to determine whether the lands in question were "needed" by the United States, a decision of this Court rejecting his interpretation of the statute might well have been futile; that the Director (who at that time was a staff assistant to the President, see Reorg. Plan No. 1, §1, 53 Stat. 1423) was acting as the delegate for the President, and the Court considered that it lacked authority to interfere with Presidential discretion in that case; or that the suit was one seeking original jurisdiction to which this Court has traditionally shown an aversion, see *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972). In short, the only thing that is clear about the *Hawaii* case is that it is impossible to discern the basis for the applicability of sovereign immunity in terms of the prior cases.

Thus, this Court's most recent decisions on sovereign immunity in suits against federal officials yield no definite answer to the question whether footnote 11 lives or whether it withered on the vine of the 1949 *Larson* decision. However, a reading of other post-*Larson* decisions reveals that on several occasions this Court has upheld orders requiring

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[34] See *e.g.*, K. Davis, Administrative Law Treatise 921-23 (Supp. 1970).

"affirmative action" by governmental officials or "the disposition of unquestionably sovereign property" – the very actions that footnote 11 suggests would run counter to sovereign immunity.

In *Vitarelli v. Seaton*, 359 U.S. 535 (1959), this Court ordered the reinstatement of an employee of the Department of the Interior on the ground that he had been unconstitutionally dismissed in violation of the Department's regulations, relief which surely required "affirmative action" by the Secretary. *Greene v. McElroy*, 360 U.S. 474 (1959), held that the Department of Defense had unconstitutionally revoked the security clearance of an employee of a private corporation and granted relief effectively requiring the reissuance of the clearance. In *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962), the determination of a Post Office official that certain magazines were unmailable was overturned, thus requiring the Government to carry the mail in question.

Similarly, in the Eleventh Amendment area, which is closely related to the federal sovereign immunity cases, this Court has never attached talismanic significance to whether the relief requested will require "affirmative action" or the "disposition of unquestionably sovereign property." Thus, this Court recently observed in one such case:

> The injunction issued in *Ex parte Young* was not totally without effect on the State's revenues, since the state law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provisions. Later cases

> from this Court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in *Ex parte Young*. In *Graham v. Richardson*, 403 U.S. 365 (1971), Arizona and Pennsylvania welfare officials were prohibited from denying welfare benefits to otherwise qualified recipients who were aliens. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), New York City welfare officials were enjoined from following New York State procedures which authorized the termination of benefits paid to welfare recipients without prior hearing.

Edelman v. Jordan, ____ U.S. ____, 94 S. Ct. 1347 (1974).[35] It is clear, therefore, that this Court has never shied away from awarding injunctive relief against government officials, even where the effect of doing so requires "affirmative action" on the part of such officials or "the disposition of unquestionably sovereign property."

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[35] In *Edelman v. Jordan*, the Court distinguished between suits having a prospective effect on the state treasury and those having a retrospective effect, holding that the latter were barred by the Eleventh Amendment while the former were not. The Court reasoned that, in a welfare case, the awarding of retroactive payments may defeat the remedial purpose of the program since the making of such payments "will invariably mean there is less money available for payments for the continuing obligations of the * * * system." 94 S. Ct. at 1357 n.11. That clearly is not the case here, where the authorized funding would not be paid retroactively, to pay past debts, but would be obligated to meet present and future needs.

Because the decisions of this Court offer little direct guidance in determining whether footnote 11 is alive, dead, or merely dormant, it is all the more important to look to the policies underlying sovereign immunity for direction. As we have said, those policies are to assure that Congress rather than the courts controls the disposition of government property and to prevent the Government from being "stopped in its tracks" by the judiciary. In light of those policies, it makes absolutely no sense to apply sovereign immunity to this case. First, this is manifestly not a case of an agency being prevented by litigation from carrying out its assigned tasks. In fact, judicial review is necessary in this case to ensure that the intent of Congress is implemented by agency officials. Moreover, it is fictional to speak of this case in terms of an unauthorized raid on the Treasury since, if Campaign Clean Water is correct on the merits, the funding authority in question was intended by Congress to be made available for sewage treatment plant construction.[36]

Instructive in this regard is *State Highway Comm'n v. Volpe*, 479 F.2d 1099 (8th Cir. 1973), where the release of contract authority for highway construction funds was sought. The Court concluded that, while under the Federal-Aid Highway Act the Secretary of Transportation had

[36] The absence of any rationale for dismissing this case on sovereign immunity grounds is demonstrated by the petitioner's concession that the doctrine is not applicable to the City of New York's suit. The policies of assuring that Congress controls Government property and that the Administrator not be subject to vexacious litigation are equally applicable or inapplicable there, and the petitioner's acknowledgement that sovereign immunity has no bearing on the *City of New York* case strongly supports our position that it is irrelevant for *Campaign Clean Water* as well.

some discretion in determining whether to obligate all of the allotted funds, "[t]he Act circumscribes that discretion." *Id.* at 1109. On petition for rehearing en banc, the Secretary raised the sovereign immunity defense for the first time. In a *per curiam* opinion denying the petition, the Court held that the case fell within the exception for acts in excess of statutory limitations. It distinguished footnote 11 on the ground that the relief being granted, which is directly analogous to that sought here, was not "affirmative" in nature, such as the Government-financed construction of dams sought in *Dugan*. "It requires only that the defendant officers cease unauthorized action * * * *The resultant release of funds is only to the extent that Congress has already authorized them to be appropriated and expended.*" *Id.* at 1122 (emphasis added). Many other of the lower courts have employed the same reasoning in similar "impoundment cases," finding immaterial the fact that public funds must be expended, where that is what Congress intended. See, *e.g.*, *State Highway Dep't v. Volpe*, No. 72-940 (D.S.C. May 7, 1974); *Louisiana v. Weinberger*, 369 F. Supp. 856, 862 (E.D. La. 1973); *Community Action Programs Executive Directors Ass'n of N.J., Inc. v. Ash*, 365 F. Supp. 1355, 1361 (D.N.J. 1973); *National Council of Community Mental Health Centers, Inc. v. Weinberger*, 361 F. Supp. 897, 900 (D.D.C. 1973); *Pennsylvania v. Lynn*, 362 F. Supp. 1363, 1368-79 (D.D.C. 1973), *rev'd on other grounds*, ___ F.2d ___ (D.C. Cir. No. 73-1835, decided July 19, 1974).

Still other lower courts, disturbed by the obvious injustice of a stringent application of footnote 11, have emphasized that the note says only that a suit "may" – not "must" – fail if affirmative relief or the disposition of Government property is sought. The Seventh Circuit

stated in a recent case that "[t]o hold that the prospect of requiring the expenditure of federal funds nonetheless creates an 'exception to the exception' would invite a thoroughly circular and untenable application of the doctrine. Accordingly, we construe footnote 11 as recognizing that the doctrine *may* bar a suit in exceptional cases (*i.e.*, where to do otherwise would impose 'an intolerable burden on governmental functions, outweighing any consideration of private harm')." *Schlafly v. Volpe*, 495 F.2d 273, 280 (7th Cir. 1974) (emphasis in original), citing *Washington v. Udall*, 417 F.2d 1310, 1318 (9th Cir. 1969).

In summary, a review of pertinent cases of this Court and of the lower courts discloses that the Administrator's argument must fail because it seeks to shroud the actions of custodians of public property with a protective blanket never contemplated by the policies underlying sovereign immunity.

2. Congress Has Effectively Given Its Consent to this Action, Thus Waiving Sovereign Immunity

The Fourth Circuit observed in *Littell v. Morton*, 445 F.2d 1207, 1212 (1971), that "we have been unable to find any case in which the Supreme Court has sought to reconcile the notion of sovereign immunity with the fundamental concept of the APA that a person adversely affected by administrative action is presumptively entitled to judicial review of its correctness." Voicing its agreement, the Seventh Circuit in *Schlafly v. Volpe*, 495 F.2d 273, 281-82 (7th Cir. 1974), cited "[t]he need for a definite statement by the Supreme Court regarding the impact of the APA on the [sovereign immunity] doctrine's continued viability * * *" This Court's decisions concerning sovereign immunity have never addressed the APA; its APA decisions have never considered sovereign immunity. It may be that, as this Court said in its brief dictum in *Blackmar v. Guerre*, 342 U.S. 512, 516 (1952), the APA is not "to be deemed an implied waiver of *all* governmental immunity" (emphasis added); nevertheless, we submit that under the facts of this case a finding of consent to suit is warranted.

On its face, the APA seems to permit the maintaining of actions against federal agency officials who might otherwise be shielded by sovereign immunity. Section 10(a) of the Act, 5 U.S.C. §702 (1970), provides simply that "[a] person * * * adversely affected or aggrieved by agency action * * * is entitled to judicial review thereof." Federal courts are specifically empowered to "compel agency action unlawfully withheld or unreasonably delayed" and to "hold unlawful and set aside agency action * * * found to be * * * an abuse of discretion, or otherwise not in accordance with law." APA §10(e), 5 U.S.C.

§706 (1970). In our view, the only rational way to square this language with the "general rule" of sovereign immunity that a suit must be dismissed "if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act,'" *Dugan v. Rank*, 372 U.S. 609, 620 (1963), with the "affirmative action" language in footnote 11 of *Larson*, and with the Administrator's assertion that only ministerial actions of governmental officials may be made subject to judicial review, is to hold that Congress did not intend that sovereign immunity bar actions in which the APA applies.

To counter this plain language, the Administrator offers only the highly formalistic assertion that since sovereign immunity is a jurisdictional issue, it can only be waived by a statute which expressly expands the jurisdiction of the federal courts. Br. 38-39. The APA does not qualify as a jurisdictional statute, [37] he reasons, because section 10(b) of the Act, 5 U.S.C. §703 (1970), governing the form of proceeding for judicial review, states that judicial review is obtainable under the APA in "any applicable form of legal action * * * in a court of competent jurisdiction". And he dismisses section 10(a)'s guarantee that any aggrieved person "is entitled to judicial review" as relating only to standing. Br. 39.

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[37] The courts of appeals divide on this question. Compare *Albert v. Chafee*, 465 F.2d 367 (9th Cir. 1972), and *Sikora v. Brenner*, 379 F.2d 134 (D.C. Cir. 1967), with *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529 (8th Cir. 1967). This Court appears never to have ruled on the issue, although such decisions as *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), and *Rusk v. Cort*, 369 U.S. 367 (1962), strongly suggest that the APA is jurisdictional.

The Administrator's argument is deficient in assuming that Congress may only consent to suits against governmental officials by enacting a jurisdictional statute. It has frequently been held, for example, that Congress waives sovereign immunity when it includes a "sue and be sued" clause in an agency's statutory charter. See, *e.g.*, *Federal Housing Admin. v. Burr*, 309 U.S. 242 (1940); *Pennsylvania v. Lynn*, ____ F.2d ____ (D.C. Cir., No. 73-1385, decided July 19, 1974) (slip opinion at 6, n.11) (finding a congressional waiver of sovereign immunity in enacting a statute providing that Secretary of HUD could "sue and be sued in any court of competent jurisdiction, State or Federal"). It has never been suggested that such provisions alone vest subject matter jurisdiction in the federal courts to hear claims against the agency, but there has never been any doubt that they constitute a valid waiver of sovereign immunity.

The APA waiver view has been accepted by the Second, [38] Fifth, [39] and District of Columbia [40] Circuits. Rejecting the waiver approach, but at the same time narrowing the

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[38] *Kingsbrook Jewish Medical Center v. Richardson*, 486 F.2d 663, 668 (2d Cir. 1973); *Kletschka v. Driver*, 411 F.2d 436, 445 (2d Cir. 1969).

[39] *Estrada v. Ahrens*, 296 F.2d 690 (5th Cir. 1961). In a more recent case in which plaintiff invoked the APA, the Fifth Circuit held that the suit was barred by sovereign immunity, without reference to *Estrada*. See *Colson v. Hickel*, 428 F.2d 1046 (5th Cir. 1970), *cert. denied sub nom. Colson v. Morton*, 401 U.S. 911 (1971). In a 1974 case the Fifth Circuit declined to say whether *Colson* signified a retreat from *Estrada*, but held that in any event *Estrada* did not extend to a contract suit for damages. *Warner v. Cox*, 487 F.2d 1301, 1305 (5th Cir. 1974).

[40] *Scanwell Laboratories v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970).

reach of the sovereign immunity doctrine through other means, have been the Fourth, Seventh, and Ninth Circuits. [41] Flatly rejecting the waiver theory have been the First, Sixth, Eighth, and Tenth Circuits. [42]

Particularly apposite to this case is the recent decision of the Seventh Circuit in *Schlafly v. Volpe*, 495 F.2d 273 (1974), where the Court adopted a limited waiver theory with respect to the Secretary of Transportation in a suit concerning the withholding of highway construction funds. While ruling that the APA alone might not constitute a waiver, the Court held that where the statute creating the program also authorized judicial review in accordance with the APA, a waiver could be found. *Id.* at 282. In the present case, the statute establishing the construction grants program also contains a clear statement of congressional intent that the Administrator of EPA may be sued. Section 505(a) of the Act sets up a special procedure whereby citizens may sue the Administrator for his failure to perform a non-discretionary duty, and section

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[41] See *Schlafly v. Volpe*, 495 F.2d 273, 280 (7th Cir. 1974), sovereign immunity may be applied only in "exceptional cases" where relief would work an "intolerable burden" on government); *Littell v. Morton*, 445 F.2d 1207, 1213 (4th Cir. 1971) (judicial review is available in APA cases unless in a particular case the policies underlying the immunity doctrine are "so transcending as to require dismissal"); *Washington v. Udall*, 417 F.2d 1310 (9th Cir. 1969) (sovereign immunity attaches only where granting of requested relief would impose an "intolerable burden" on the government clearly outweighing any private harm).

[42] *Sierra Club v. Hickel*, 467 F.2d 1048 (6th Cir. 1972), *cert. denied sub nom. Sierra Club v. Morton*, 411 U.S. 920 (1973); *Motah v. United States*, 402 F.2d 1 (10th Cir. 1968); *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529 (8th Cir. 1967); and *Cyrus v. United States*, 226 F.2d 416 (1st Cir. 1950).

505(e) provides that "[n]othing in this section shall restrict any right which any person * * * may have under any statute or common law to * * * seek any * * * relief against the Administrator * * *" Thus, Congress surely contemplated that the Administrator would be answerable under the APA. When the language of section 505(e) is coupled with the explicit language of the APA evidencing congressional approval of suits by aggrieved persons against governmental officials, it is proper to infer that Congress did not intend that the Administrator be permitted to hide behind the outworn doctrine of sovereign immunity.

B. The Administrator's Impoundment Action Is Not "Agency Action Committed to Agency Discretion By Law" And Does Not Involve a "Political Question"

The Administrator argues that this is one of those rare cases in which the statute is "drawn in such broad terms that in a given case there is no law to apply," thus triggering the "very narrow exception" to reviewability under the APA for cases involving agency action committed to agency discretion by law. [43] Br. 39-47. See generally *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). In addition, he invokes the "political question" doctrine, insisting that deciding this case "would thrust the courts

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[43] The Administrator states in his Brief at pages 39 and 40, and note 14, that the APA is the "only basis" for judicial review here, arguing that Campaign Clean Water's reliance on 28 U.S.C. §1361 is misplaced because a writ of mandamus "may only issue to compel the performance of a ministerial act." This argument, based largely on cases predating the enactment of section 1361, ignores the thrust of the more recent cases discussed in note 30, *supra*.

into the area of political judgments by requiring managerial decisions." Br. 47. The crux of the Administrator's position with respect to both arguments is that "Congress has not prescribed the standards the President is to apply in deciding how much of the amounts authorized are to be initially allocated."[44] Thus, whether these contentions stand or fall depends upon whether the Act imposes discernible limitations on the Administrator's impoundment discretion. If it does, then there is "law to apply" in the form of standards to guide the Administrator and the courts in determining the outer limits of permissible impoundment, and the defenses must fail.

Panama Canal Co. v. Grace Line, 356 U.S. 309 (1958), the only case cited by the Administrator in support of his "committed to agency discretion" argument, is distinguishable on its facts from this case. Justice Douglas, writing for the Court, concluded from the statute at issue and from the long and close relationship between Congress and the Government-owned Panama Canal Company, that Congress had intended not to allow judicial review of the toll setting authority which ultimately was in the hands of the President. The statute before the Court in this case and the relation

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[44] Br. 47. It is interesting that the Administrator's brief speaks in terms of standards to guide "*the President*" in making the allotments since the Act specifically states that it is the Administrator who is to make the allotment decision. See §205(a). It is perfectly clear from the President's letter to the Administrator of November 22, 1972, and the Administrator's press release announcing the allotment on November 28, 1972, that the allotment decision was in fact made by the President and not by the Administrator. See App. 15-16; U.S.E.P.A., *Environmental News* (Nov. 28, 1972). It is thus arguable that the Administrator's action was not within his authority by reason of his abdication to the President and his failure to exercise his statutory discretion at all.

between Congress and the Administrator are of a very different character. Accordingly, petitioner's reliance on language from *Panama Canal Co.*, without regard to the special facts of that case, is unwarranted. See *United States v. Richardson*, ____ U.S. ____ 42 U.S.L.W. 5076, 5079 n.9 (June 25, 1974).

The central failing of the Administrator's position on the "committed to agency discretion" point is that it utterly misconceives the nature of the task the courts are being asked to undertake in reviewing the Administrator's exercise of his impoundment discretion. In a nutshell, Campaign Clean Water's contention is that the Administrator's allotment discretion is not unbounded but is limited by the goals and requirements of the Act discussed in Part I above. Both of the lower courts have agreed with this position, although the Court of Appeals ruled that further evidentiary proceedings were needed to determine whether the Administrator has exceeded the limits of his discretion. At such proceedings, the Administrator might offer evidence concerning the amounts needed to meet the Act's goals and requirements, such as the 1977 secondary treatment requirement, or might point to other factors that he considered in determining that the program established by Congress could be reduced by 55 percent without thwarting the purposes of the Act. After hearing the evidence, the District Court might reach any number of conclusions, including: that the Administrator had not exercised his discretion at all, but had acted solely at the behest of the President, see note 45, *supra;* that the Administrator had exercised his discretion but had either considered factors irrelevant to the lawful exercise of his discretion, see *Citizens to Preserve Overton Park v. Volpe*, *supra*, 401 U.S. at 416, or had failed to consider factors

required by the Act, such as the amount of funding needed to meet statutory deadlines; that the Administrator considered the correct factors in reaching his decision, but nevertheless committed a "clear error of judgment," *id.*, by allotting so small a sum as to render impossible meeting the goals and requirements of the Act; or that the Administrator acted within his discretion.

Although, like much of the work of a federal judge, these determinations are not without complexity, they can be made without the Court's assuming the role of Administrator. As the District Judge below stated, "[t]he Court will not and cannot supervise the Administrator in the administration of the Act." Pet. App. 99A. The Court of Appeals expressed its agreement with the District Judge's perception of his role, adding:

> The court's power is well stated in 82 *Yale L.J.* at p. 1751:
>
> "The court need not seek to derive some lower figure but need simply test the contested impoundment against the legislative intent as expressed in the act to determine whether the impoundment was an abuse of discretion. It will derive its own construction of the statute then test the administrative action to see whether it could rationally be a carrying out of the Act's mandate." [Pet. App. 47A].

Congress gave the Administrator an inch; he has taken a mile. In such a situation, the courts need not mark the exact point along the continuum – two inches, six inches, or more — past which the Administrator could not venture

without having stepped out of bounds. The courts need only hold that, whatever the outer limits of the Administrator's authority, they clearly do not extend so far as to empower him to eviscerate the Act by slashing over one-half of the funding provided by Congress for the first two fiscal years of the construction grant program's operation.

For similar reasons, the Administrator's contention that this suit presents a "political question" must be rejected. For this argument, the Administrator cites principally a "'lack of satisfactory criteria for judicial determination," quoting *Coleman v. Miller*, 307 U.S. 433, 454-55 (1939). See also *Baker v. Carr*, 369 U.S. 186, 217 (1962) (naming "a lack of judicially discoverable and manageable standards" as one earmark of a "political question" case). Again, this ignores the goals and requirements of the Act, which furnish standards against which to judge the exercise of the Administrator's discretion.

This Court has said that "the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation," *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967), and are to be "construed * * * not grudgingly but as serving a broadly remedial purpose." *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 156 (1970). Where, as here, there is "law to apply" in the form of discernible statutory standards, the action being challenged should not be held to be "committed to agency discretion by law" or to pose a nonjusticiable "political question."

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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